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8 *Minev, Green, and Fox (NDOC Defendants)*

9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11 ZANE M. FLOYD,
12 Plaintiff,

Case No. 3:21-cv-00176-RFB-CLB

13 v.

**NDOC DEFENDANTS’
NOTICE OF PROFFER**

14 CHARLES DANIELS, DIRECTOR,
NEVADA DEPARTMENT OF
15 CORRECTIONS, ET AL.,
16 Defendants.

17 Defendants Charles Daniels, Harold Wickham, William Gittere, William Reubart,
18 David Drummond, Dr. Michael Minev, Dr. David Green, and Linda Fox (collectively,
19 “NDOC Defendants”), by and through counsel, Aaron D. Ford, Attorney General for the
20 State of Nevada, and D. Randall Gilmer, Chief Deputy Attorney General, hereby bring this
21 notice of proffer.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 During the evidentiary hearing yesterday, June 28, 2021, the Director of the Nevada
24 Department of Corrections (“NDOC”), Charles Daniels, was asked to provide the expiration
25 date of the potassium chloride NDOC currently has in stock to complete the lethal injection
26 required under Nevada law to carry out Plaintiff Zane Floyd’s death sentence. The Court
27 invited counsel for the NDOC Defendants to make a proffer regarding the expiration date;
28 however, the issue was not resolved during the evidentiary hearing given the fast-moving

1 nature of the proceedings. This notice of proffer provides the expiration date of the
2 potassium chloride NDOC currently has in stock: July 31, 2021.¹ Mr. Floyd's counsel is
3 already in possession of the invoice attached in Exhibit B as it was produced on June 17,
4 2021.

5 The NDOC Defendants believe the July 31st expiration date of the potassium
6 chloride is highly relevant to the Court's analysis of injunctive relief or a stay.² Specifically,
7 Floyd's execution is currently set for the week of July 26, 2021, the expiration date
8 demonstrates that the NDOC Defendants will suffer actual prejudice under a three-to-four-
9 month preliminary injunction and/or stay as NDOC will be deprived of a known drug for
10 use in the lethal injection. NDOC can no longer obtain potassium chloride through the
11 ordinary means by which NDOC purchases medications.³ Because this information is
12 directly pertinent to the Court's consideration of the factors require Floyd must show for
13 injunctive relief or a stay, the NDOC Defendants submit the instant notice of proffer. The
14 NDOC Defendants are willing to make themselves available for a telephonic or video
15 hearing today should the Court believe further inquiry into this issue is necessary.

16 Respectfully submitted on this 29th day of June, 2021, by:

17 AARON D. FORD
18 Attorney General

19 By: /s/ D. Randal Gilmer
20 D. Randall Gilmer (Bar No. 14001)
21 Chief Deputy Attorney General

22 *Attorneys for NDOC Defendants*

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24
25 ¹ See **Exhibit A**, Declaration of NDOC's Pharmacy Director Linda Fox; **Exhibit B**,
Cardinal Health Invoice.

26 ² *Winter v. Natural Resources*, 555 U.S. 7, 24 (2008) (injunctive relief factors); *United*
27 *States v. Mitchell*, 971 F.3d 993, 996 (9th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418,
433 (2009)) (stay factors).

28 ³ **Exhibit A**, ¶¶ 9–10.

EXHIBIT LIST

Exhibit	Title	Pages
<i>A</i>	<i>Declaration of NDOC's Pharmacy Director Linda Fox</i>	<i>3</i>
<i>B</i>	<i>Cardinal Health Invoice</i>	<i>2</i>

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EXHIBIT A

**DECLARATION OF LINDA FOX,
PHARMACY DIRECTOR OF THE NEVADA
DEPARTMENT OF CORRECTIONS**

EXHIBIT A

1 AARON D. FORD
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12 Plaintiff,
13 v.
14 CHARLES DANIELS, DIRECTOR,
NEVADA DEPARTMENT OF
15 CORRECTIONS, ET AL.,
16 Defendants.

Case No. 3:21-cv-00176-RFB-CLB

**DECLARATION OF LINDA FOX,
PHARMACY DIRECTOR OF THE
NEVADA DEPARTMENT OF
CORRECTIONS**

18 I, Linda Fox, hereby declare based on personal knowledge and/or information and
19 belief, that the following assertions are true.

20 1. I have been a registered pharmacist with the State of Nevada since 1990.

21 2. I have worked as a pharmacist for the Nevada Department of Corrections
22 (NDOC) since 2004.

23 3. I currently am the Pharmacy Director for the NDOC, a position I have held
24 since 2010. This position is also occasionally referred to Chief of Pharmacy or Pharmacy
25 Director. I am responsible for the administrative and day-to-day functions of
26 pharmaceutical services for the NDOC. This position requires me to do many things,
27 including ensuring that medications are ordered, obtained, and properly stored and secured
28 until they are utilized for their intended use.

1 4. Due to sensitive and confidential issues associated with lethal injection, my
2 job duties, under both former Director James Dzurenda and current Director Charles
3 Daniels, has included ordering and purchasing medications that, in the discretion of either
4 Director, would be appropriate for use in any legally scheduled and authorized execution.

5 5. As part of my duties as Pharmacy Director, I am tasked with ordering each of
6 the drugs using the Cardinal Health ordering portal, as this is the way NDOC ordinarily
7 purchases its medications.

8 6. In 2019, Former NDOC Director James Dzurenda asked me to purchase
9 potassium chloride, if it was available. I was able to do so through the Cardinal Health
10 order portal in the same manner the NDOC ordinarily purchases its medications. See
11 **Exhibit B**, Cardinal Health Invoice.

12 7. The potassium chloride I purchased pursuant to Director Dzurenda's
13 instruction is still in the possession of the NDOC and will expire on July 31, 2021.

14 8. In 2021, Director Daniels also authorized me to purchase, if available through
15 the NDOC's ordinary transactional efforts, an additional supply of potassium chloride.

16 9. However, potassium chloride was no longer an eligible product for the NDOC
17 to purchase on the Cardinal Health order portal.

18 10. While I take no position as to whether those drugs should be used in the
19 NDOC Protocol, as that is not my decision to make, I can attest that potassium chloride is
20 not readily available for purchase to the NDOC.

21 11. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the
22 foregoing is true and correct.

23 EXECUTED this 29th day of June, 2021.

24 /s/ Linda Fox*
25 Chief Linda Fox
26 Pharmacy Director,
Nevada Department of Corrections

27 * Pursuant to Temporary General Order 2020-05, entered by Chief Judge Du on March 30,
28 2020, <https://www.nvd.uscourts.gov/wp-content/uploads/2020/03/GO-2020-05-re-COVID-19-Remote-Hearings.pdf>, and as extended on March 29, 2021, <https://www.nvd.uscourts.gov/wp-content/uploads/2021/03/Order-Extending-GO-2020-05.pdf>, Chief

1 Fox has authorized counsel to affix her electronic signature to this Declaration. Should
2 counsel have misconstrued these Temporary Orders in any way, or if the Court wishes to
3 have a hand-signed copy of this Declaration, one will be provided to the Court upon request.
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EXHIBIT B

Cardinal Health Invoice

EXHIBIT B

623) 478-8500

CARDINAL HEALTH
600 N 83RD AVE
TOLLESON, AZ 85354

PAGE 1 OF 1 ROUTE/STOP 312 / 007

DV



CardinalHealth
 NV DEPT OF CORRECTION CTR PHCY
 CENTRAL PHCY
 3955 W RUSSELL RD-CASA GRANDE
 LAS VEGAS, NV 89118

DEA RW-0263056 FEDID 68-0158739
 NV DEPT OF CORRECTION CTR PHCY
 CENTRAL PHCY
 3955 W RUSSELL RD-CASA GRANDE
 LAS VEGAS, NV 89118

CUST. NO.	DATE	ORIGINAL INVOICE	
163264	7/08/19	4778072	
REG. NO.	CUST. DEA NO.	ORDER NO.	CUSTOMER P.O. NUMBER
CA00001	AS2995922	7000581	
	ORDER DATE	CONF. NO.	
	7/05/19	01954	

ITEM NUMBER	NDC/UPC	QTY	DESCRIPTION	SIZE	RETAIL PRICE	UNIT PRICE	EXTENSION
5471487	72439-0500-10	8	POTASSIUM CL 2MEQ/ML 10X10ML	10MM		28.50	228.00
	TOTE#991						
		8	PIECES SHIPPED				228.00
		8	TOTAL PIECES SHIPPED				228.00
----- S U M M A R Y -----							
			Total RX		228.00		
			NET AMOUNT		228.00		

on hand

INVOICE SHIP DATE: 7/07/2019

For SDS Visit: <http://www.mycardinalsdsdpd.com>

PLEASE REMIT YOUR PAYMENTS TO FOLLOWING ADDRESS:
 CARDINAL HEALTH LLC, LLC
 C/O BANK OF AMERICA
 PO BOX 56412
 LOS ANGELES, CA 90074-6412

exp 7/21

8/07/19
DUE DATE

22800

1. Drug Code 2. Vendor 3. Brand Name 4. NDC Code 5. Drug Code	6. Drug Code 7. Brand Name 8. Drug Code 9. Drug Code	10. Drug Code 11. Drug Code 12. Drug Code 13. Drug Code	14. Drug Code 15. Drug Code 16. Drug Code 17. Drug Code
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Customer is a final dispenser purchasing for own use and will not redistribute prescription pharmaceuticals into the secondary market.

The prices shown on this invoice are net of discounts provided at the time of purchase. Some of the products listed on this invoice may be subject to additional discounts or rebates. Please refer to your contract for any specific additional discounts or rebates that may apply to these purchases. You may have an obligation pursuant to 42 U.S.C. § 1320a-7b to report discounts and rebates to Medicare, Medicaid or other governmental health care programs. Effective January 1, 2015, DRCSA Transaction Data for qualified prescription drugs can be accessed via

NDOC-DPP-0028